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91-792 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1991

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WILLIS SARGENT, WARDEN,
ARKANSAS DEPARTMENT OF CORRECTION
PETITIONER

V.

WILBURN A. HENDERSON
RESPONDENT

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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GERALD A. COLEMAN
DURRETT & COLEMAN
P.O. Box 1667
West Memphis, AR 72303
501-735-3735
Arkansas Bar No. 82034

Attorney for the Respondent

## STATEMENT OF THE CASE

After the respondent was convicted by a jury in Sebastian County, Arkansas, of capital murder and sentenced to death, his direct appeal was denied and his Petition for Post-Conviction Relief was also denied by the Arkansas Supreme Court, Henderson v. State, 281 Ark. 406, 664 S.W.2d 451 (1984).

Respondent filed his Petition for Writ of Habeas Corpus claiming ineffective assistance of counsel at the penalty phase and at the guilt/innocence phase. The issue of ineffective assistance at the guilt/innocence phase had not been raised on direct appeal or through the post-conviction petition to the State court.

The United States District Court for the Eastern District of Arkansas found that respondent had been denied effective assistance of counsel at both the penalty phase and the guilt/innocence phase. The District Court and the Eighth Circuit both held that the cause requirement for procedural default was met by ineffective assistance of counsel at the post-conviction phase. The Eighth Circuit Court of Appeals also specifically held that, even if cause where not established by ineffective assistance of post-conviction counsel, respondent was probably factually innocent of the charge, and affirmed the granting of the writ.

The Eighth Circuit Court of Appeals made a finding of the fact of actual innocence based upon a great deal of evidence which they found pointed to the victim's husband as the actual killer. This evidence included numerous statements that he knew his wife was dead before her body was discovered, the fact that he was the last

person known to have seen her alive, and that he had the means, motive and opportunity to murder his wife. This case is set for retrial on the merits on January 21, 1992, and respondent requests that the court deny the State's Petition for Writ of Certiorari.

## SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari filed herein by the State of Arkansas should be denied because Henderson met the standard for "actual innocence" established by this Court in Murray v. Carrier, 477 U.S. 478 (1986). There is no confusion among the circuits as to the meaning of the term "actual innocence" in the guilt/innocence phase.

## THE DETERMINATION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT REGARDING ACTUAL INNOCENCE TO OVERCOME PROCEDURAL DEFAULT IS CORRECT

In Murray v. Carrier, 477 U.S. 478, 496 (1986), this Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default." It is difficult to imagine a clearer example than the instant case for the application of this exception. Substantial evidence was presented by the respondent at his habeas hearing to support his claim that he did not commit the crime for which he was convicted, that this evidence, although available to trial counsel, was not investigated or utilized by counsel, and that such ineffective assistance resulted in his wrongful conviction.

Respondent's claim was never based upon mere "legal" innocence, but addressed the ultimate issue of factual innocence. Petitioner's statement that "Henderson indeed may have a legal claim to put before the jury, but that in no way meets the standard as announced," is erroneous. Petitioner appears to be arguing that the defendant should be required to prove his innocence beyond a reasonable doubt in order to excuse procedural default on the grounds of actual innocence; such a standard is not obtainable in any case, particularly a habeas corpus action.

Similarly, the assertion by the petitioner that the Eighth Circuit found that the respondent was actually innocent because "other suspect" evidence was not presented, and that the court thus only applied the prejudice prong of the test set out in Wainwright

v. Sykes, 433 U.S. 72 (1977), is also a misstatement. The Eighth Circuit specifically found that, because defense counsel fell so far below the "objective standard of reasonableness" required by Sykes, the reliability of the entire conviction was questionable, and the jury, given these facts, would very likely have acquitted respondent. In other words, the respondent was probably actually innocent, but, because of the ineffectiveness of his counsel, he was convicted anyway.

In addition, petitioner's assertion that "nothing could be shown even at the habeas hearing that could connect the husband to the murder," is far from accurate. Both the United States District Court and the Eighth Circuit Court of Appeals commented upon the strength and the abundance of the evidence, presented at the habeas hearing, which strongly implicated the victim's husband in her murder. This case is clearly distinguishable from cases such as Coleman v. O'Leary, 825 F.2d 696 (7th Cir. 1988), cited by petitioner in its brief, in which there was overwhelming evidence of the guilt of the defendant. The only evidence against the respondent was a piece of paper left at the crime scene, and the respondent's statement, later recanted, that he had been at the store and saw who actually committed the murder. The Eighth Circuit and the District Court also pointed to the abundant evidence of the respondent's history of mental illness which should have been used to explain why respondent made such a statement.

Finally, petitioner cites several cases, among them Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990), Clark v. Dugger, 901 F.2d 908 (11th Cir. 1990), and Aldridge v. Dugger, 925 F.2d 1320 (11th

Cir. 1991), in support of its proposition that this Court should decide to hear this case because the circuits are in disagreement regarding the meaning and application of the "actual innocence" standard. Unfortunately, none of the cases cited supports that thesis. Each of these cases involves the reliability of the imposition of the death penalty upon the particular defendant. If anything, these cases have in common a confusion over how the "actual innocence" standard should be extended to the sentencing phase, and this is simply not an issue in the instant case. Furthermore, all of the cases cited by the petitioner are from the same circuit; this hardly demonstrates widespread disagreement and confusion among the circuits. The courts do not appear to have any difficulty defining actual innocence in the guilt/innocence phase. This Court has properly declined to narrowly define that term, leaving such definition to common sense and the plain meaning of the words.

## CONCLUSION

Respondent therefore requests that this Court deny the Petition for Writ of Certiorari filed herein by the State of Arkansas.

BY: _____

GERALD A. COLEMAN
DURRETT & COLEMAN
P.O. Box 1667
West Memphis, AR 72303
501-735-3735
Arkansas Bar No. 82034

## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has served a copy of the above foregoing, attached and annexed instrument or pleading on all parties hereto by depositing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

Winston Bryant
Attorney General
200 Tower Bldg.
323 Center Street
Little Rock, AR 72303

This service affected this 11th day of December, 1991.

Gerald A. Coleman